No. 09-234

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

WALTER A. McNEIL,

Petitioner,

v.

WILLIAM GREG THOMAS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

(Restated)

In a capital habeas proceeding, does 28 U.S.C. § 2254(i), which provides that the "ineffectiveness or incompetence" of post-conviction counsel "shall not be grounds for relief in a proceeding arising under section 2254," prohibit a district court from ever equitably tolling the limitations period for habeas petitions based on the affirmative misconduct of court-appointed counsel?

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Respondent's Brief in Response to the Petition for a Writ of Certiorari

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The respondent William Greg Thomas readily concedes that the petition raises an extremely important question of federal law on which the courts of appeals are deeply divided and that this Court should therefore issue a writ of certiorari. Mr. Thomas files this brief in opposition in order to provide a more complete and accurate statement of facts than presented in the petition and to address a jurisdictional wrinkle not adequately addressed in the petition.

STATEMENT OF THE CASE

A. Facts Supporting Application of Equitable Tolling

The State is correct that the deadline for Mr. Thomas to file a federal habeas petition was June 18, 2003, under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 (1996), and that his petition was not filed until March 22, 2004. The facts related by the State regarding the factual

basis for the district court's decision to apply equitable tolling, however, are incomplete and misleading.

Mr. Thomas's conviction and death sentence became final when this Court denied certiorari in his direct appeal in 1997. *Thomas v. State*, 693 So. 2d 951 (Fla.), *cert. denied*, 522 U.S. 985, 118 S. Ct. 449, 139 L. Ed. 2d 385 (1997). He filed his first state court motion for post-conviction relief 321 days later in October 1998. While that proceeding was still pending in July 2002, he filed a separate post-conviction motion (the "*Ring* motion") based on this Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The one-year AEDPA limitations period was tolled with 44 days remaining while these proceedings remained pending. 28 U.S.C. § 2244(d)(2) (2000).

At this time, Mr. Thomas was being represented by Dale Westling. Mr. Thomas knew that he did not have a lot of time left to file a federal habeas petition and was concerned that Mr. Westling would not or could not handle his federal proceeding. He had his girlfriend contact several other attorneys, and they ultimately found Mary Catherine Bonner. Ms. Bonner represented that she had substantial experience with federal post-conviction proceedings, and she agreed to seek to have the court appoint her to replace Mr. Westling.

The first motion for post-conviction relief was finally denied on March 3, 2003, when the Supreme Court of Florida issued its mandate affirming the trial court's denial of the motion. The *Ring* motion remained pending, however, so the AEDPA limitations period remained tolled.

In March 2003, Ms. Bonner sent Mr. Thomas a draft federal habeas petition for him to sign and return. Shortly thereafter, on March 24, she filed a motion in the federal district court asking that she be appointed as Mr. Thomas's counsel. This was the first paper filed on Mr. Thomas's behalf in federal court. Ms. Bonner represented in the motion that the matter was urgent because Mr. Thomas's AEDPA deadline was quickly approaching. Two days later, on March 26, the district court conducted an emergency telephone hearing and appointed her immediately.

A few days later, she advised Mr. Thomas that the district court had granted the motion and appointed her as his counsel. Based on this correspondence from Ms. Bonner, Mr. Thomas signed the habeas petition and returned it to Ms. Bonner on April 3 so she could file it on his behalf. He knew that the district court would strike his petition if he filed it himself because he was represented by counsel.

On April 15, Ms. Bonner wrote Mr. Thomas and advised that she had determined that the AEDPA deadline had already past. She was mistaken. The state trial court had just denied the *Ring* motion on April 4, 2003, and the time to appeal from that ruling would not expire until May 5, 2003. Thus, the AEDPA limitations period would not expire until 44 days after May 5, which was June 18, 2003.

In any event, Ms. Bonner advised Mr. Thomas in the April 15 letter that she would take another "week or so" to perfect and file the habeas petition to present the strongest case possible to the district court. Had she done as she promised, his

petition would have been timely. Mr. Thomas believed her, and it was not until three years later that he learned from a court order that Ms. Bonner had not filed the petition as promised.

He was not alone in expecting Ms. Bonner to have done what she promised. Due to Ms. Bonner's representations about the urgency of her appointment, the district court had expected that she would file the habeas petition "almost immediately" after her appointment on March 26. When it had not received a petition more than two months later, the court issued an order on June 4 directing Ms. Bonner to advise of the status of the habeas petition no later than June 17, 2003.

She filed a status report on June 12 advising that she needed another six weeks to investigate, research, and draft the habeas petition. On July 21, she filed another status report advising that she needed six more weeks. When another seven months went by without the court having heard anything, it issued an order directing Ms. Bonner to advise the court of the status of the petition by March 15, 2004, or face dismissal for failure to prosecute.

On March 15, she filed a status report that asked for leave to file the petition no later than March 19. The court entered an order noting that leave was not required to file a petition and that it would consider the timeliness issue once the petition was actually filed. Ms. Bonner finally filed Mr. Thomas's petition on March 22, 2004.

After initial briefing by the parties on the timing issue demonstrated that Ms. Bonner's conduct was called into serious question, the district court appointed the undersigned attorney to represent Mr. Thomas for the limited purpose of addressing the timing issue. The court eventually conducted an evidentiary hearing at which it heard live testimony by Mr. Thomas (via video-conference from death row), Mr. Westling, and Ms. Bonner.

Ms. Bonner did not dispute any of the facts related above. In her defense, she explained that she had been facing personal issues that were "very severe and very overwhelming." These issues began when she came home and found her husband of 40 years lying on the floor after having suffered a stroke. She had no other family and this event was "monumental" to her, partly because she had similarly found her father on the floor after a stroke when she was only 13. The following spring, she was hospitalized with anemia, which was a serious concern as she had only recently overcome a battle with cancer. Shortly after that, while she was caring for her husband, Ms. Bonner fell and suffered a serious closed-head injury and also broke her arm. And shortly after that, her husband began suffering a series of seizures or possible heart attacks and ultimately required open-heart surgery.

The State argued in part that the failings of Mr. Thomas's counsel amounted to nothing more than garden variety negligence, which does not support equitable tolling. But it also asked the court to consider the "possibility" that Ms. Bonner had intentionally filed the petition late "as part of a strategy to attack the AEDPA."

The court ultimately made findings of fact establishing the above-related facts. The court concluded:

> In hindsight, from the moment that Ms. Bonner filed her urgent application for appointment to be Petitioner's attorney, she has engaged in an egregious pattern of misfeasance. She has been grossly negligent to be sure, but it goes beyond that. Ms. Bonner, apparently deliberately, let the limitations period go by because she was not ready to file and felt that further investigation was required.
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> This recitation reveals that Ms. Bonner's actions in securing an emergency appointment to represent Petitioner, in thereafter failing to file the petition in April 2003, after telling Petitioner she would do so, in thereafter willfully failing to file the petition even with the prodding of the Court and in willfully ignoring the importance of filing within the limitations period, sets her conduct above mere professional negligence, and rises to the level of bad faith.
>
> Moreover, Ms. Bonner herself has tried to explain her misfeasance as being the product of mental impairment she suffered as a result of a serious injury and "very severe and very overwhelming" stress caused by her health issues and that of her spouse. Of course, mental impairment is specifically mentioned in *Holland* [*v. McNeil*, 539 F.3d 1334 (11th Cir. 2008),] as being one of the criteria which "can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling."
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> If, as the state argues, Ms. Bonner missed the statute of limitations deadline on purpose, there is no evidence that she did so with the approval of her client. Indeed, ultimately, it would be the client who would suffer from the missed deadline because his case would not be heard on the merits (however unlikely it is that the state thinks that he will ultimately prevail on the merits). Thus, even if the state proved to be correct about Ms. Bonner's motivations, its argument would prove too much because the Eleventh Circuit in *Holland* lists "divided loyalty" as one of the criteria which would justify equitable tolling based upon egregious attorney misconduct. If, as the state suggests, Ms. Bonner, with calculation, but without consulting her client, chose to miss the statute of limitations deadline on purpose, she has rendered disloyal service to her client, not to mention to this

Court, which appointed her to represent Petitioner at her urgent request.

> Having lived with this case from the beginning and having now reviewed all of the evidentiary materials, judging the credibility of the witnesses and being informed by the law, the Court finds that Petitioner Thomas has shown by a preponderance of the evidence the type of extraordinary circumstances beyond his control envisioned by the Eleventh Circuit in *Downs* [*v. McNeil*, 520 F.3d 1311 (11th Cir. 2008),] and *Holland* to justify equitable tolling based upon egregious attorney misconduct.
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> The Court also finds that Petitioner Thomas has been sufficiently diligent. The record demonstrates that he was actively participating with his counsel, Ms. Bonner, and previous counsel, Mr. Westling, and took all reasonable steps to ensure the timeliness of his attempt to seek federal habeas review. Moreover, Petitioner submitted to Ms. Bonner a completed, signed habeas petition for filing on or about April 3, 2003. By this time, the Court had appointed Ms. Bonner to represent him in this Court and any effort by Mr. Thomas to file the petition himself likely would have resulted in the petition being stricken. Moreover, Petitioner Thomas was deceived by Ms. Bonner, who both told him she was filing the petition in April 2003 when she in fact did not, and who kept advising him that his petition was already untimely when it was not. There was nothing more that Thomas could reasonably have been expected to do.

(Pet. App. at A-34 (citations omitted).) Based on these findings, the court held that the AEDPA limitations period should be equitably tolled from April 2003 through the date Ms. Bonner filed the petition in 2004.

B. The Other Two Cases in the "Unfortunate Trilogy"

In addition to Mr. Thomas's case, the district court considered the cases of two other Florida death row inmates whose counsel had missed the AEDPA deadline: Mark James Asay and Floyd Damren. The court appointed the undersigned counsel to represent all three defendants and conducted evidentiary

hearings on the equitable tolling question in all three cases at the same time. The court summarized its ultimate conclusions in the three cases as follows:

> The Court is aware that the Eleventh Circuit has set a very high threshold to meet the requirements of equitable tolling based on a habeas petitioner's counsel's misfeasance. In the first case of this unfortunate trilogy, *Damren*, the Court has concluded that equitable tolling was not appropriate, notwithstanding the gross negligence of petitioner's counsel. However, acknowledging that the line between "gross negligence" and "bad faith" or "divided loyalty" is hard to draw, the Court concludes that *Thomas* and *Asay* are the rare cases where equitable tolling should be applied.

Mr. Asay was also represented by Mr. Westling and Ms. Bonner, and the district court found that equitable tolling should apply for largely the same reasons as in Mr. Thomas's case. Mr. Asay's case has followed the same procedural posture since then: the district court certified its equitable tolling ruling for an interlocutory appeal under 28 U.S.C. § 1292(b); the court of appeals denied the State's petition for leave to appeal; and the State has petitioned this Court for a writ of certiorari. The main difference between Mr. Thomas and Mr. Asay's cases is that Mr. Asay's involves an alternative holding that is not present in Mr. Thomas's case. Mr. Asay's petition is pending in this Court as Case Number 09-216, and he has filed a brief in opposition that concedes that this Court should review the equitable tolling issue but suggests that his case has a vehicle problem that makes Mr. Thomas's case better suited for review by this Court.

C. Deficiencies in Florida's Provision of Counsel for Post-Conviction Proceedings in Capital Cases

Messrs. Asay, Thomas, and Damren are not the only Florida death row inmates who have missed the AEDPA deadline and face the possibility of having no

federal review whatsoever due to the conduct of their court-appointed counsel. At the evidentiary hearing in these cases, Mr. Thomas identified 21 defendants currently on Florida's death row whose court-appointed counsel failed to file their federal habeas petitions within the AEDPA limitations period.

Indeed, Florida stands out as providing an alarmingly deficient level of representation to capital defendants. The state legislature originally created the office of the Capital Collateral Regional Counsel ("CCRC") to provide effective representation to capital defendants who could not afford their own counsel to represent them in post-conviction proceedings in state and federal court. The CCRC was originally divided into three regional offices, but the office for the northern region of Florida was disbanded. Thus, capital defendants from this part of the state are no longer represented by CCRC attorneys. Instead, they are represented by attorneys appointed from a state registry of private attorneys. Messrs. Asay, Thomas, and Damren, who were all convicted and sentenced in Jacksonville, were all represented by registry counsel during their post-conviction proceedings until the district court appointed the undersigned counsel in their federal habeas proceedings.

Experience has shown that the registry system has been a disaster in practice. The district judge in this case noted that it was very difficult to find competent attorneys to accept these appointments. And there is ample evidence that registry counsel provide a much lower level of competent representation than CCRC attorneys. For example, even though the majority of Florida death row

inmates are still represented by CCRC counsel from the other two regions, 19 out of the 21 death row inmates who have missed their AEDPA filing deadlines were represented by registry counsel.

A recent report by the American Bar Association titled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report" (the "ABA Report")[1] concluded:

> Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

The report notes that Florida has sentenced more innocent defendants to die than any other state.[2] The report concludes that Florida suffers from a lack of qualified and properly monitored registry attorneys to handle cases outside of the CCRC regions and that the state provides grossly inadequate compensation to attract high quality lawyers to the registry. In the average capital case, registry counsel can expect to be paid about $25 an hour.[3]

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[1] This report can be found at http://www.abanet.org/moratorium/assessmentproject/florida/report.pdf.

[2] According to the report, since 1973, 22 Florida death row inmates have been exonerated, and 60 have been executed.

[3] Registry attorneys are paid $100/hour, but the total fee is capped at $84,000. Fla. Stat. § 27.711(4) (2009); *see also* Fla. Stat. § 27.7002(5) (2009) (prohibiting use of state funds to exceed the cap); *but see Olive v. Maas*, 811 So. 2d

And a 2007 audit of Florida's capital collateral counsel system (the "CCRC Audit"),[4] demonstrates the tremendous disparity in the comparative competence of CCRC and registry counsel. For example, the report found that CCRC counsel timely file federal habeas petitions 93% of the time, compared to registry counsel who file timely habeas petitions only 73% of the time. As of June 2006, eight Florida death row inmates had lost their right to federal review because their counsel failed to timely file their habeas petitions, and seven of those inmates were represented by registry counsel. Registry attorneys interviewed far fewer witnesses and used far fewer experts than CCRC counsel. Registry attorneys spent about one-

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644, 653-54 (Fla. 2002) (construing § 27.711(4) to authorize trial courts to award higher fees in capital cases where extraordinary or unusual circumstances exist); *Maas v. Olive*, 992 So. 2d 196, 198 (Fla. 2008) (construing § 27.7002(5) to not apply where the trial court has found extraordinary or unusual circumstances).

The ABA report notes that the Spangenberg Group, which it considers to be the nation's leading expert on the delivery of indigent defense services, estimates that 3,300 attorney hours are required in the average capital post-conviction process at the state level alone. Thus, in the average capital case – i.e., a case not presenting extraordinary or unusual circumstances – a registry attorney can expect to be paid about $25/hour.

[4] The report was prepared by the Florida Auditor General pursuant to Fla. Stat. § 27.701(2) (2005). It can be found at www.myflorida.com/audgen/pages/pdf_files/2007-092.pdf.

fifth the time per case as CCRC attorneys. Unsurprisingly, defendants represented by registry counsel prevailed in a far smaller percentage of cases.

Finally, justices of the Supreme Court of Florida have been outspoken in their criticism of the quality of registry counsel. Then-Chief Justice Barbara Pariente wrote a letter to the chair of the state senate committee on criminal appropriations urging that the disbanded CCRC regional office be reinstated based on the unanimous view of the justices of that court that the private attorney registry system in north Florida has been a failure. And then-Justice Raoul Cantero testified to a legislative committee that the representation provided to capital defendants by registry counsel constituted "some of the worst lawyering" he has ever seen.

All of this information was presented to the district court below, although the court found much of it to be irrelevant to the issue of whether Mr. Thomas was entitled to equitable tolling.

ARGUMENT

I. The Issue of Whether § 2254(i) Bars Equitable Tolling Based on Attorney Misconduct Warrants Review by This Court Because It Is an Important Question of Federal Law on Which the Courts of Appeals Are Deeply Divided.

While he disputes the State's position on the merits, including its assertion that the ruling below is in conflict with any decision from this Court, Mr. Thomas concedes that there is a deep split among the courts of appeals on the issue of whether attorney misconduct can support equitable tolling of the AEDPA

limitations period. He also concedes that this is an issue of paramount importance that merits prompt review by this Court.

Mr. Thomas further notes that the issue is best decided in a case like this one – a capital case involving the misconduct of court-appointed registry counsel from Florida. Because "death is different," capital cases frame the issue in its most compelling terms and implicate arguments not available to non-capital defendants seeking the benefit of equitable tolling. *Compare Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir.) (holding that a more lenient standard for equitable tolling should apply in capital cases), *cert. denied*, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001), *with Rouse v. Lee*, 339 F.3d 238, 254-55 (4th Cir. 2003) (*en banc*) (rejecting analysis in *Fahy* based on conclusion that this Court's "death is different" precedents only apply to issues regarding procedural safeguards at trial and not in appellate or post-conviction proceedings), *cert. denied*, 541 U.S. 905, 124 S. Ct. 1605, 158 L. Ed. 2d 248 (2004).

Cases like this one that involve the conduct of court-appointed counsel raise questions regarding the applicability of agency theory, which is the basis for some courts' refusal to apply equitable tolling based on attorney conduct. *Compare Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) (holding that because an attorney is the agent of the client, a habeas petitioner cannot obtain equitable tolling based on even intentional misconduct of his counsel), *with Downs v. McNeil*, 520 F.3d 1311, 1320-21 (11th Cir. 2008) (rejecting reasoning in *Powell* because of exceptions

to the rule that an agent's actions are attributable to his principal and holding that serious attorney misconduct overcomes the effect of agency).

Finally, the issue is perhaps best framed in a case involving serious misconduct by Florida registry counsel. Given the demonstrable failings in this system and the grossly disparate quality of representation by registry counsel compared to CCRC counsel, serious equal protection and due process questions can arise if § 2244(i) is interpreted not just to preclude habeas *relief* for ineffective assistance of counsel, but to preclude habeas *review* where the incompetence and malfeasance of counsel resulted in an untimely habeas petition.

Whether in this case or another, this Court should determine whether and under what circumstances a capital defendant may be entitled to equitable tolling based on the conduct of his or her counsel. There are two other petitions pending in this Court by Florida capital inmates who missed their AEDPA deadline due to the actions of their court-appointed registry counsel. In addition to the companion case of *McNeil v. Asay*, Case No. 09-216, in which Mr. Asay points out a vehicle problem, Albert Holland has filed a petition for writ of certiorari in *Holland v. Florida*, Case No. 09-5327.

Holland is less suited as a vehicle to decide the issue because it did not involve affirmative misconduct by counsel. Rather, the question presented in that case is whether the "gross negligence" of counsel can support equitable tolling. Additionally, while the parties in both this case and *Asay* agree that certiorari review is appropriate, the State opposes certiorari in *Holland*. Particularly in light

of the State's interest in resolving collateral proceedings in capital cases quickly, the State's position on this matter should be entitled to some deference.

II. The Court of Appeals's Denial of the State's Petition for Leave to Appeal Under 28 U.S.C. § 1292(b) Does Not Present a Vehicle Problem.

The State's petition correctly states that this Court has jurisdiction over this case, but it glosses over the fact that the court of appeals denied the State's petition for permission to appeal under 28 U.S.C. § 1292(b). This Court has statutory certiorari jurisdiction to review "[c]ases in the courts of appeals." 28 U.S.C. § 1254(1) (2006).[5] An argument could be made that because the court of appeals denied the State's application for permission to appeal under § 1292(b),[6] this case

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[5] The full text of the relevant statutory provision is as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
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> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ....

28 U.S.C. § 1254 (2006).

[6] This statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, it shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless

was never "in the courts of appeals." For example, the Court once ruled that it lacked statutory certiorari jurisdiction in habeas cases where the court of appeals denied a certificate of probable cause, which was a prerequisite for the court of appeals to have appellate jurisdiction. *House v. Mayo*, 324 U.S. 42, 44, 65 S. Ct. 517, 519, 89 L. Ed. 739 (1945), *overruled by Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

The Court does not appear to have ever discussed the applicability of § 1254(1) when a court of appeals denies an application for review under § 1292(b), but it has exercised its jurisdiction at least once to review a case in that procedural posture. In *Tidewater Oil Co. v. United States*, 409 U.S. 151, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972), the Court reviewed and affirmed a decision by the court of appeals to deny leave to appeal pursuant to § 1292(b). Although it did not address the basis for its own jurisdiction, the Court held that the court of appeals properly denied leave to appeal because interlocutory appeals are prohibited in government civil antitrust suits pursuant to section 2 of the Expediting Act of 1903, 32 Stat. 823. *Id.* at 173-74, 93 S. Ct. at 421.

Perhaps more importantly, the Court has reconsidered and overruled its holding in *House v. Mayo* and has concluded that it does have jurisdiction under § 1254(1) over a habeas appeal even where the court of appeals denied a certificate of appealability. *Hohn*, 524 U.S. at 253, 118 S. Ct. at 1978. In *Hohn*, the Court

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> the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (2006).

concluded that consideration and denial by a court of appeals of a habeas petitioner's request for a certificate of appealability constitutes a "case in the court of appeals" and therefore the Court had jurisdiction to review the case. *Id.* at 241-45, 118 S. Ct. at 1972-74. The Court emphasized that the matter had been handled by the court of appeals in a manner that indicated it was a case in that court: the matter was entered on the court of appeals's docket; it was submitted to a panel of three judges from the court of appeals; it was decided by an opinion; there was a dissent; the court of appeals entered a judgment and a mandate; and the court of appeals considered and rejected a motion for rehearing. *Id.* at 242; 118 S. Ct. at 1973.

Nearly all of those same events happened in this case. The petition was docketed by the clerk of the court of appeals just like any other appellate proceeding, and it was assigned a docket number by the clerk. It was submitted to a panel of three judges, and the panel issued an order denying the petition. The order was entered under the court's seal, and its caption indicated that it was being entered in an "Appeal from the United States District Court for the Middle District of Florida" and referred to the State as the "Appellants." The order was accompanied by a letter from the clerk stating that the panel's order "is issued as the mandate of this court." The three-judge panel entertained and denied the State's motion for reconsideration.

Commentators have agreed that the reasoning in *Hohn* should apply to other cases in which a court of appeals has denied permission to appeal. *See* Robert L.

Stern et al., *Supreme Court Practice* § 2.2 at 71 (8th ed. 2002) (concluding in light of *Hohn* that "the Court has given a broad interpretation to the word 'cases' so as to include not only a full-blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals"); 17 Charles Alan Wright et al., *Federal Practice & Procedure* § 4036 n.24 (3d ed. 2007) (concluding that in light of the reasoning in *Hohn*, § 1254(1) likely grants certiorari jurisdiction where the court of appeals denied leave to appeal under § 1292(b) or "any other statute requiring leave to appeal"); Scott E. Gant, *The Law of Unintended Consequences: Supreme Court Jurisdiction over Interlocutory Class Certification Rulings*, 6 J. App. Prac. & Process 249 (2004) (arguing that the Court has jurisdiction to review a district court's class certification order even where the court of appeals has denied permission to appeal under Fed. R. App. P. 23(f) and noting that the Court likely also has jurisdiction where the court of appeals denied review under § 1292(b)).

If the Court has concerns that, notwithstanding *Hohn*, it may not have jurisdiction over this case, the jurisdictional questions would best be answered at the merits stage and not at the certiorari stage, especially where, as here, both parties agree the Court has jurisdiction. *Cf. Hohn*, 524 U.S. at 240-41, 118 S. Ct. at 1972 (noting that since the petitioner and respondent agreed there was jurisdiction, the best course was to grant certiorari to decide the question and appoint an *amicus curiae* to argue that the Court lacked jurisdiction). Because this issue, by definition, will never arise in the courts of appeals and can be decided by this Court

only, the jurisdictional wrinkle actually presents an additional reason for the Court to grant certiorari.

While the Court must, of course, determine whether the denial of leave to appeal deprives it of jurisdiction, it does not have to decide whether the court of appeals abused its discretion in denying leave. Section 1254(1) grants jurisdiction to this Court to review "cases" in their entirety, not just the specific ruling of the court of appeals. Thus, for example, this Court has ruled on the merits of habeas appeals even where the court of appeals denied a certificate of appealability. *E.g.*, *Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000). Indeed, so long as the case is in the court of appeals, this Court is free to review the district court's order directly even before the court of appeals has disposed of the appeal. *See* 28 U.S.C. § 1254(1) (providing jurisdiction either "before or after rendition" of the court of appeals's decision). *See generally* Stern et al., *supra*, §§ 2.3-2.4 (compiling cases in which this Court has exercised its power to directly review district court decisions without the benefit of an opinion from the court of appeals). And, of course, this Court can review and even reject a district court's ruling even where the court of appeals summarily affirmed without an opinion. Stern et al., *supra*, § 2.2 at 73. *See also Forsyth v. Hammond*, 166 U.S. 506, 513, 17 S. Ct. 665, 668, 41 L. Ed. 1095 (1897) (noting that the similar antecedent to § 1254(1) "was intended to vest in this court a comprehensive and unlimited power" of review that "is not affected by the condition of the case as it exists in the Court of Appeals").

Thus, there is no reason for the Court to take up the question of the whether the court of appeals "abused its discretion" in denying the State's request for permission to appeal. Indeed, given the Eleventh Circuit's clear holdings in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), and *Holland v. McNeil*, 539 F.3d 1334 (11th Cir. 2008) (pet. for cert. pending Case No. 09-5327), *see also Melson v. Allen*, 548 F.3d 993, 1001 (11th Cir. 2008) (reiterating *Holland* standard that egregious misconduct beyond gross negligence is required to support equitable tolling), and the egregious nature of the attorney conduct in this case, there was no reason why the Eleventh Circuit should have granted review itself. All that would have happened had the court of appeals granted the State leave to appeal is that several months would go by while the case was briefed, argued, and likely affirmed in light of the clear holdings in *Downs*, *Holland*, and *Melson*. There is no reason for the court of appeals to further consider the equitable tolling issue before this Court decides the main question presented in the petition.

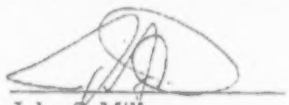
Finally, the Court should resist any temptation to wait to decide the equitable tolling issue until a final judgment is entered. While it is true that review by this Court might delay the proceedings in the district court, the State of Florida is the party who has the paramount interest in obtaining speedy resolution of capital cases. In its considered judgment, the State has decided that, from a system-wide point of view, that interest would best be served by the Court deciding the equitable tolling issue in this case or in *Asay*. While Mr. Thomas disagrees with

the State on the merits of its argument, the State's position on the most efficient manner for determining the question should be entitled to the greatest of deference.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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